STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS (ON REMAND)
(Bandstra, P.J., and Gage and Wilder, J.J.)

C.C. MID WEST, INC.,
a Michigan corporation,

Plaintiff-Appellant,

v.

HOWARD McDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA, individuals,

Supreme Court No. 123237

Court of Appeals Case No. 213386
(On Remand from Supreme Court as on Rehearing Granted)

Oakland Circuit Case No. 97-550272-NZ
Hon. Denise Langford-Morris

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I. Defendants Continue To Assert An Outdated View of ERISA Preemption.

Defendants rely on cases and analysis dating to the dawn of ERISA preemption 30 years ago, that are outdated and/or inapposite. They repeatedly cite Pilot Life Ins Co v Dedeaux, 481 US 41; 107 S Ct 1549; 95 L Ed 2d 39 (1987) without noting that it involved a claim of improper benefit processing. They cite the majority opinion in Rush Prudential HMO, Inc v Moran, 536 US 355; 122 S Ct 2151; 153 L Ed 2d 375 (2002) as barring judicial expansion of remedies beyond those provided in ERISA, without acknowledging that it involved ERISA's "savings clause," which has never been at issue here. They ignore that both Pilot Life and Rush have been criticized for "disregard[ing] the fundamental presumption against implied preemption in an area historically regulated by the States." Rosenbaum v UNUM Life Ins Co of Am, 2003 US Dist Lexis 15652, * 24 (ED Penn, 2003). They cite Garren v John Hancock Mut Life Ins Co, 114 F3d 186 (CA 11, 1997) as preempting tortious-interference claims without noting that it "clearly involved a traditional ERISA action – a refusal to pay benefits." Commodities Specialists Co v Brumet, 2002 US Dist Lexis 25399, *15 & n 5 (D Minn, 2002)(rejecting Garren as inapposite to issue of whether ERISA preempts action for employee's breach of non-compete/non-disclosure plan). They cite Yerkovich v AAA, 231 Mich App 54; 585 NW2d 318 (1998), without noting that this Court reversed it, 461 Mich 732; 610 NW2d 542 (2000) and thus rendered it without binding precedential effect on any issue. Dunn v Detroit Auto Inter-Ins Exch, 254 Mich App 256, 265-66; 657 NW2d 153 (2002). And in general they rely heavily on pre-Travelers case law, when courts have universally acknowledged that "Travelers occasioned a significant change in preemption analysis, and required careful reconsideration of any preexisting precedent dependent on the expansive view of 'related to' that held sway before it." Gerosa v Savasta & Co, 329 F3d 317, 327 (CA 2), *cert denied*, __ US __; 124 S Ct 435; 157 L Ed 2d 312 (2003)(citing cases).

At the same time, defendants largely ignore the post-1995 preemption case law that requires reinstatement of C.C. Mid West's[1] claims. C.C. Mid West's main brief spends six pages (pp 28-33) discussing two cases in which Federal appellate courts have refused to apply ERISA preemption in similar circumstances, Dishman v UNUM Life Ins Co of America, 269 F3d 974 (CA 9, 2001) and Marks v Newcourt Credit Group, Inc, 342 F3d 444 (CA 6, 2003) – and yet defendants mention neither one (despite the fact that their counsel represented the prevailing party in Marks). Defendants dwell in the past for reasons that should be obvious.

Indeed, from its very first line defendants' brief makes a series of sweeping claims as to why ERISA should preempt Michigan's common law of tortious interference. But each claim is belied by one or more of the cases cited in C.C. Mid West's first brief, in which courts, employing the current analytical framework, refuse to apply ERISA preemption:

> **"C.C. Mid West's complaint requires the examination of the ERISA plan that is administered by Defendants – ERISA fiduciaries..."** [Defs' brief at 1].

In Marks, plaintiff's claimed damages of $1.5 million were expressly based on the amount he would have been entitled to under the ERISA plan, necessitating examination of the plan. In Strehl v Case Corp, 1997 US Dist Lexis 17681 (ND Ill, 1997), a chiropractor sought damages from ERISA plan fiduciaries who sent defamatory letters to plan participants, his patients. And in Darcangelo v Verizon Communications, Inc, 292 F3d 181, 193 (CA 4, 2002), the court necessarily engaged in some plan interpretation, if only to determine that the complaint accused defendants of "conduct that was entirely unrelated to and outside of the scope of their duties under the plan or in carrying out the terms of the plan." While each case implicated an ERISA plan to some extent and thus required examination of plan terms, in each the connection was too tenuous and remote to invoke preemption.

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[1] As of January 6, 2004 C.C. Mid West has taken the name Central Transport, Inc.

> **"Taken to the logical conclusion, if C. C. Mid West were allowed to bring its state law claims and prevail, the Plan would be required to either change its benefit determinations or be penalized for not changing them."** [Defs' brief at 9 (emphasis bold in original)].
>
> **"...in essence, C. C. Mid West seeks to cause the Fund either to change its benefit determination or to punish the Fund if it does not change the benefit determination. As such, C.C. Mid West is making a disguised claim for benefits on behalf of drivers who participate in the Fund."** [Id at 2].

First, the Fund is not a party to this action. Second, Judge Rosen (correctly) rejected defendants' mischaracterization of the claims in this action more than six years ago, when he noted that C.C. Mid West is not a party authorized to seek benefits from an ERISA plan and was in fact not seeking benefits. 990 F Supp at 921 & fn 6, Apx 96a. The Court of Appeals agreed:

> Defendants also claim that plaintiff merely disputes a benefits determination that defendants made that allegedly caused harm to the plan participants and that plaintiff is actually making a claim for benefits on behalf of the drivers. We are compelled to disagree with defendants' characterizations of plaintiff's claims. [Opinion (On Remand) at 4; Apx 22a].

C.C. Mid West is not making a "disguised claim for benefits." Rather, it asserts claims under Michigan common law, against these individual defendants, solely on its own behalf.

> **"...C.C. [Mid] West asserts state law claims that directly challenge benefit decisions made by ERISA fiduciaries and communicated to ERISA plan participants.** [Defs brief at 1].
>
> **"C.C. Mid West's fundamental problem is about a benefit determination made by Defendants...."** [Id at 2].

Strehl centered on communications from ERISA plan fiduciaries to participants about plan benefits, that harmed a third party. So too did Grand Park Surgical Ctr v Inland Steel Co, 930 F Supp 1214, 1217-18 (ND Ill, 1996)(letter from employer to employees/plan participants telling them not to pay medical center's allegedly inappropriate bills) and Thrift Drug v Universal Prescription Admins, 131 F3d 95 (CA 2, 1997)(pharmacy brought breach-of contract action against prescription benefits plan administrator that failed to reimburse it for prescriptions

dispensed). Each case involved a "benefit decision" or "determination" at some level, but in each, the link to ERISA was insufficient to warrant preemption. This case is even further removed, since C.C. Mid West's evidence shows there was no benefit determination to make.

> **"...even if the administration of the fund was malicious as alleged by plaintiff, the manner in which the Pension Fund was administered is a critical factor in plaintiff's claims and thus plaintiff's claims are subject to pre-emption."** [Defs' brief at 8, citing Opinion (On Rem)(Apx 23a)].

Inverness Corp v McCullough, 1999 US Dist Lexis 19557 (D Mass, 1999) arose directly out of investment decisions made by defendants, trustees of an ERISA-governed pension plan. In Dishman, 269 F3d at 981-984, plaintiff's State-law privacy claim was based on the offensive conduct of the private investigator hired by the ERISA plan to look into plaintiff's claim. In each case (and many others cited in C.C. Mid West's main brief), the allegations arose directly out of ERISA plan administration, and thus "the manner in which the [plan] was administered" was far more central to the claim than in this case. Yet in each case the court refused to preempt. As Dishman so accurately put it, defendants here advocate the same "uncritical literalism" in applying ERISA's "relate to" wording, that the U.S. Supreme Court has admonished courts to avoid. 984 F3d at 839.

> **"...the very act complained of by C.C. Mid West – communicating with plan participants by persons with authority to communicate for the plan about plan benefits – is not an act incidental to fiduciary conduct, but rather is a core fiduciary act which carries out 'an important plan purpose' which renders the individual a 'fiduciary' and therefore, subject to the fiduciary responsibility provisions and regulatory scheme of ERISA Section 404."** [Defs' brief at 23-24 (emphasis bold in original)].

While it is undisputed that defendants are subject to ERISA's regulatory scheme, it is equally undisputed – among Judge Rosen, the Court of Appeals and C. C. Mid West, anyway; defendants are fairly silent on the point – that C.C. Mid West is not. And the import of that appears totally lost on defendants. The cases cited at pp 17-26 of C.C. Mid West's main brief

make clear that a plaintiff's location outside the constellation of ERISA-regulated entities is perhaps the single most important factor, post-Travelers, in determining whether its claims are preempted. The acts that led to the complaints in Strehl, Grand Park, Thrift Drug, Inverness, Dishman and other cases could all be deemed "core fiduciary acts" – yet none were protected from State-law liability by preemption when they caused harm to non-ERISA entities.

In other words, the crucial point in this case is not that defendants are governed by ERISA's regulatory framework – it's that C.C. Mid West is not.

> **"Whether the Defendants made truthful or fraudulent communications with plan participants, they still made communications, and those communications directly related to the benefits available under the Plan."** [Defs' brief at 31].

Many of the cases discussed in C.C. Mid West's first brief – Thrift Drug, Grand Park and Strehl, to name just a few – involved State-law claims that arose directly out of fiduciary communications relating to an ERISA plan, yet were not preempted. Defendants all but ignore these cases; indeed their brief does not even mention Grand Park, the applicability of which C.C. Mid West has argued since the motion for summary disposition in 1998. (Apx 37a). Ironically, defendants now seem to agree that the logical endpoint of their argument would be to immunize them for informing plan participants of a lucrative new benefit but conditioning eligibility upon participation in a racially or religiously motivated vendetta, or for authorizing contract "hits" on geriatric plan participants whose longevity threatens plan solvency. While the absurdity of that position should be self-evident, it apparently escapes defendants.

Indeed, for the first time defendants now suggest that they should be protected even if such outrageous communications were "fraudulent" – for instance, presumably, if they instigated the above-described vendetta without any intent to actually give the promised benefit to those who carried it out. Defendants propose the complete and total immunization of any statement –

even if false, fraudulent or malicious – that falls from the lips of an ERISA fiduciary, and can in any way be cast as "directly related to the benefits available under the Plan." Defs' brief, p 31. That was not the law of ERISA preemption even pre-Travelers; it certainly is not the law today.

> **"...once a pension benefits determination has been made by the plan fiduciaries, the fiduciaries have an obligation under ERISA to communicate that decision to the affected plan participants."** [Defs' brief at 9-10].
>
> **"Federal law requires plan fiduciaries to timely communicate material information affecting the interest of the beneficiaries and to do so solely by considering the interest of the plan and its beneficiaries. This means that, as a matter of federal law, the ERISA fiduciaries must disregard the interest of third parties such as C.C. Mid West."** [Id at 25].

The plan administrator in Strehl, once it determined that Dr. Strehl was practicing beyond the scope of his license, no doubt felt obligated to communicate that to participants, regardless of the impact on Strehl. The employer in Grand Park, after determining that the medical center was overbilling and providing inappropriate care, no doubt felt obligated to communicate with plan participants, regardless of the impact on the center. Each defendant had to answer in court, under State-law theories, for the harm their communications inflicted upon non-ERISA entities – statements that were much more akin to legitimate plan administration than those at issue here.

> **"C.C. Mid West concedes that the fiduciaries were acting in their roles as administrators over the plan...."** [Defs' brf at 4].

C. C. Mid West makes no such concession. Rather, as the Complaint states plainly, and as is discussed in detail in C.C. Mid West's first brief, the heart of this action is C.C. Mid West's allegation that the defendants' conduct had nothing to do with legitimate Fund administration, and that they acted "solely for inappropriate ends," using "conduct that is entirely outside the scope of plan administration" – just as in Darcangelo. C.C. Mid West's main brief, pp 46, 47.

> **"To avoid possibly inconsistent regulation, courts have routinely found that state law tort claims, including tortious interference claims, are preempted,**

even when ERISA preemption leaves the plaintiff without any remedy." [Defs' brief at 10 & fn 6 (emphasis bold in original)].

Each case that defendants cite in support of that point involved tortious-interference claims brought by ERISA entities, relating to misuse of an ERISA plan and/or denial of benefits. It makes sense to limit such entities solely to relief under ERISA – even if it provides them none – because Congress intended the Act's regulatory schema to define the universe of relief for ERISA entities. But defendants fail to cite a single case in which a State common-law tort claim brought by a non-ERISA entity has been preempted, leaving that non-ERISA entity without a remedy. As the 6th Circuit stated in Marks – ironically enough, at the urging of counsel for defendants in this action – "[i]n deciding whether state-law claims are preempted by ERISA, we have focused on the remedy sought by plaintiffs." 342 F3d at 453 (citation omitted). C.C. Mid West seeks money damages, not plan benefits. And it has no remedy if its claims are preempted.

> **"...it is not apparent from Darcangelo's complaint that the conduct charged has anything to do with administering the employee benefits plan."** [Defs' brief at 33, citing 292 F3d at 187].

That is precisely the allegation that C. C. Mid West levels, and has now supported with evidence. As in Darcangelo, C.C. Mid West alleges that defendants' threats (which they have never retracted) have nothing to do with legitimate fund administration, and everything to do with their own personal animosities toward C.C. Mid West and its corporate affiliates.

> **"Thus, as the Fourth Circuit recognized in Darcangelo, claims based on communications to participants – even if motivated by malice – 'relate to' an ERISA plan and are preempted."** [Defs' brief at 33].

That is an inaccurate statement of Darcangelo's holding as it applies to this case. As in Darcangelo, C.C. Mid West alleges that defendants in carrying out their personal vendettas "undertook conduct that was entirely unrelated to and outside the scope of their duties under the plan or in carrying out the terms of the plan," i.e. "improper conduct so unrelated to the plan that

it cannot be termed 'plan administration' of any sort," and were "simply behaving as a rogue administrator, acting entirely outside the scope of [their] duties under the plan." 292 F3d at 193 (Apx. 113a). (Darcangelo also shows why some level of "plan interpretation" is permissible without implicating ERISA preemption: otherwise, how would one know that defendants' alleged conduct was "entirely unrelated to and outside the scope of their duties under the plan")?

Defendants dissemble when they claim "there was a degree of ambiguity" surrounding the owner-operators' self-contribution rights. Defs' brief at 22 & n 13. They make that claim by saying that their threat applied only to those "who **otherwise** qualified to make self-contributions (because they remained on layoff status and had not completely terminated their employment relationship)..." Id (bold in original). But the very point of the evidence C.C. Mid West submitted is that there were no owner-operators "otherwise qualified to make self-contributions," since all of them were "terminated" as part of the shutdown agreement. (Apx. 55a, Termination Agreement, p 1). While there is in fact no ambiguity surrounding the deceptive and illusory nature of defendants' threats, their claim that there was "a degree" of it, Defs' brief at 22 & fn 13, all but admits that summary disposition under MCR 2.116(C)(4) was inappropriate.[2]

II. Courts Nationwide Continue To Recognize the Post-Travelers Curtailment of ERISA's Preemptive Sweep.

Since the filing of C.C. Mid West's main brief, additional cases have been reported in which courts have refused to preempt State-law claims with ERISA. In Betancourt v Storke Housing Investors, 31 Cal 4th 1157; 82 P3d 286; 8 Cal Rptr 3d 259 (2003), the California Supreme Court applied the same post-Travelers analytical framework advanced by C.C. Mid West, and held that ERISA does not preempt California's mechanic's-lien statute even when

[2] As a point of clarification, defendants' brief at p 5, fn 7 misstates this case's procedural history. Defendants filed the motion for summary disposition that is the subject of this appeal after their improper removal of the case and its subsequent remand to State court – not before.

applied to recover fringe-benefit contributions to an ERISA-governed plan. The court noted that the statute was a law of general applicability since it applied to "a wide variety of situations, including an appreciable number that have no specific linkage to ERISA plans," and was within the exercise of California's historic police powers. 31 Cal 4th at 1166-1168; 8 Cal Rptr 3d at 264-266; 82 P3d at 290-291. Because defendant failed to show that it was Congress's "clear and manifest purpose" to preempt such a law, the court held plaintiff's claim not preempted:

> We could not hold pre-empted a state law in an area of traditional state regulation based on so tenuous a relation without doing grave violence to our presumption that Congress intended nothing of the sort. [31 Cal 4th at 1168; 8 Cal Rptr 3d at 265-266; 82 P3d at 291, citing California Div of Labor Stds Enforcement v Dillingham Construction, NA, Inc, 519 US 316, 334; 117 S Ct 832, 837; 136 L Ed 2d 791 (1997) and DeBuono v NYSA-ILA Medical and Clinical Svcs Fund, 520 US 806, 814-815; 117 S Ct 1747; 138 L Ed 2d 21 (1997)].

In In re Lupron Mktg and Sales Practices Litigation, 295 F Supp 2d 148 (D Mass, 2003), drug manufacturers sought to use ERISA preemption to derail overcharging claims brought under a State consumer-protection statute. Rejecting the (familiar) claim that the suit concerned benefit payments and thus implicated a "core ERISA concern," the court refused to preempt – the claims were not being asserted as an alternative enforcement mechanism to ERISA and thus had "no real bearing on the intricate web of relationships" among ERISA entities:

> [Plaintiff] Twin Cities is seeking under a state law of general applicability to recover on behalf of the beneficiaries of the plan money that it believes was leached from the plan by third party fraud...Because none of the badges of ERISA preemption are remotely implicated, no ERISA preemption is at play. [295 F Supp 2d at 180].

ERISA does not preempt C.C. Mid West's claims.

CONCLUSION/RELIEF REQUESTED

There is no question that the conduct alleged by C.C. Mid West, had it come prior to ERISA's enactment in 1974, would have subjected defendants to State common-law tort liability

for damages inflicted upon C.C. Mid West. Thus the question becomes whether Congress in enacting ERISA intended to change that situation. Given the strong, almost irrebuttable presumption in favor of not preempting State common law in areas of traditional State regulation, the inherent vagueness in ERISA's general preemption provision and the paucity of legislative history indicating that Congress intended to immunize such conduct – or that it even remotely considered the matter in 1974 – defendants cannot meet their "considerable burden" of showing that Michigan's common law of tortious interference with contract and business expectancy is preempted in this case.

Plaintiff C.C. Mid West requests that the Court reverse the Court of Appeals's January 17, 2003 Opinion (On Remand) affirming the trial court's grant of summary disposition in favor of defendants, and send this 1997 case back to the Oakland County Circuit Court for defendants to answer the Complaint, and for discovery and trial.

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Dated: March 1, 2004
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